In The
Supreme Court of the United States
October Term, 1989

United States of America,
Appellant
v.
Shawn D. Eichman, *et al.*,
Appellees

United States of America,
Appellant
v.
Mark John Haggerty, *et al.*,
Appellees

On Appeals from the United States District Courts
for the District of Columbia and the
Western District of Washington

BRIEF OF PEOPLE FOR THE AMERICAN WAY, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE FREEDOM TO READ FOUNDATION, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND THE VOLUNTEER LAWYERS FOR THE ARTS AS AMICI CURIAE IN SUPPORT OF APPELLEES

Timothy B. Dyk
(Counsel of Record)
Glen D. Nager
Margaret H. Meriwether
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 879-3939

Of Counsel:
Elliot M. Mincberg
John S. Comperchio
People for the American Way
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

(Additional Of Counsel Continued on Inside Cover)

Of Counsel:

RICHARD SCHMIDT
COHN & MARKS
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036
(202) 293-3860

BRUCE SANFORD
DOUGLAS LEE
BAKER & HOSTETLER
1050 Connecticut Ave., N.W.
11th Floor
Washington, D.C. 20036
(202) 861-1500

J. LAURENT SCHARFF
REED SMITH SHAW & MCCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8660

QUESTION PRESENTED

Whether the First Amendment prohibits the government from prosecuting the defendants under the Flag Protection Act of 1989, a statute which provides special punishment for persons who, through their expressive acts, knowingly damage the American flag.

(ii)

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INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of People for the American Way, the American Society of Newspaper Editors, the Freedom to Read Foundation, the Radio-

Television News Directors Association, the Society of Professional Journalists, and the Volunteer Lawyers for the Arts. *Amici curiae* are organizations that are dedicated to the protection of freedom of expression and of the press.

People for the American Way is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, the organization now has over 285,000 members nationwide. People for the American Way's own education and advocacy activities depend fundamentally on First Amendment rights, and it has a broad concern for protecting such freedoms in our country.

The American Society of Newspaper Editors was founded over 50 years ago. It is a nationwide, professional organization of more than 1,000 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society include assisting journalists in providing an unfettered and effective press in the service of the American people.

The Freedom to Read Foundation was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions for fulfilling the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work that they may legally acquire; and to set legal precedent for the freedom to read of all citizens.

The Radio-Television News Directors Association, with a membership of more than 3,000, is the principal professional organization of journalists—executives, editors, reporters and others—who gather and disseminate news and other information on radio and television in the

United States. It is committed to the protection of freedom of expression and of the press.

The Society of Professional Journalists is a voluntary, nonprofit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism. Preservation of First Amendment freedoms of the press are of deep concern to the Society.

The Volunteer Lawyers for the Arts was founded in 1969 to provide free arts-related legal assistance to artists and arts organizations. The first organization in the United States dedicated to offering such services, it now helps those who cannot afford private counsel in all creative fields, including music, theater, film, video, literature, dance, and visual arts. Volunteer Lawyers for the Arts believes that freedom of expression is of critical importance to the work of artists, and as their representative Volunteer Lawyers is committed to the safekeeping of that freedom.

Amici believe that the defendants' political protest, while offensive to the vast majority of the American people, is expression situated at the First Amendment's core. Indeed, it is the apparent offensiveness of the expression that makes First Amendment protection important. As a practical matter, protection for speech that gladdens the hearts of the American people is hardly necessary. The First Amendment is essential to guarantee freedom for "the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

The amici are participating in these cases because they fear that the emotion and passion provoked by defendants' means of protest may obscure the important First Amendment rights and principles at issue here. That, in turn, could have deep and lasting effects on the First

Amendment's application in other areas. Our country and our Constitution, and the flag that symbolizes them, are not threatened by a few dissidents who burn a flag. Indeed, for nearly 200 years Congress saw no need for a statute banning flag desecration; it was not until 1968 that Congress first enacted such a statute. *See* Pub. L. No. 90-381, 82 Stat. 791 (codified at 18 U.S.C. § 700 (1968)).

This brief is filed pursuant to Rule 37.3 of the Rules of the Supreme Court. The parties have consented to its submission with letters on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

The question presented in these cases is whether the government may constitutionally prosecute defendants for their overtly political acts of burning flags under the Flag Protection Act of 1989—a statute that singles out the American flag for protection against knowingly inflicted harm. We submit that the government may not do so.

A. The Flag Protection Act's prohibition is directly related to the suppression of expression. The Act, which singles out only the American flag for protection, cannot be justified as an effort merely to protect the flag's physical integrity; Congress simply has no interest in protecting the flag's physical ingredients—the cloth and dye of which it is made—for their own sake. Rather, as the Solicitor General acknowledges, the Act's prohibition can be justified only by reference to the government's interest in protecting the idea of the flag and the ideas—such as unity and respect for our Nation—that the flag represents. The government seeks to protect that interest by prohibiting expression that it believes will be damaging to those ideas. In short, the Act has as its purpose the suppression of expression that attacks the flag as a symbol, and is thus content-based.

Senator Biden, as *amicus curiae* (the "Amicus"), suggests that the Flag Protection Act is content-neutral because it purportedly regulates evenhandedly. This suggestion is incorrect as a matter of fact; the language of the Act demonstrates that Congress has forbidden flag burning only where it is likely to endanger the flag's symbolic role. Such "viewpoint" regulation is anathema to the notion of free expression. In all events, however, the Amicus' suggestion confuses "viewpoint" regulation with "content" regulation. In order to be content-neutral, as opposed to merely viewpoint-neutral, the justification for regulation must have nothing to do with content. The Flag Protection Act's justification—protection of the flag's symbolic integrity or, stated differently, protection of the flag's dignity from expression that is seen as damaging—focuses *only* on the content of the speech and the direct impact that speech has on its listeners. The conclusion that such a statute is content-based follows from the Court's decision in *Spence v. Washington*, 418 U.S. 405, 414 & n.8 (1974), where the Court held invalid a statute banning the attachment of objects to the flag, even though the statute regulated without regard to whether the actor intended to communicate a message.

In addition, a law is not "content-neutral" merely because some non-expressive conduct could come within its prohibitions. The Flag Protection Act's impact will almost invariably fall on conduct that is expressive in nature. This adverse impact gives rise to a strong inference that Congress' purpose was to restrict expression, an inference which no one has rebutted.

Any possible doubt about Congress' purpose in enacting the Flag Protection Act is resolved by the legislative history of the statute. Members of Congress repeatedly and forthrightly declared that, in protecting the flag's symbolic value, they sought to suppress those who would express themselves by damaging the flag. This Court may

look to this legislative history to confirm that Congress' purpose was speech-suppression.

B. The Solicitor General properly recognizes that this statute purposefully suppresses speech, but asks the Court to repudiate *Texas v. Johnson*, 109 S. Ct. 2533 (1989), where the Court held that purposeful speech-suppression of this type violates the First Amendment. The only argument that the Solicitor General offers to justify departing from the doctrine of *stare decisis* in that Congress, in its considered judgment, has determined that the statute ought to be held constitutional. This assertion is untenable. This Court has repeatedly reaffirmed that it is for the Court, exercising its own independent judgment, to decide whether Congress has violated the Constitution, especially when the First Amendment is at stake.

C. Laws, of course, are not necessarily invalid merely because they protect symbols of the existing order. The government may encourage respect for a symbol, and it may prevent others from interfering with its own property. Thus, for instance, the government may fly its own flags, and it may punish those who steal and damage them. The First Amendment, however, does not allow the government to regulate for the sole purpose of suppressing the speech of others, as it has so manifestly sought to do here.

Upholding the Flag Protection Act would strike at the heart of the First Amendment. Validating Congress' effort to ban expression that might damage the flag's symbolic integrity would threaten far more than the right of protestors to burn the American flag. It would provide a basis for sustaining any law, even a modern Alien and Sedition Act, designed to protect the government from criticism.

ARGUMENT

THE FLAG PROTECTION ACT VIOLATES THE FIRST AMENDMENT

These cases are "made difficult not because the principles of . . . [their] decision are obscure but because the flag involved is our own." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). As both courts below recognized, the flag is a symbol of "beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit." *Texas v. Johnson*, 109 S. Ct. 2533, 2548 (1989) (Kennedy, J., concurring). But, as both courts below also recognized, central among these beliefs, and to the First Amendment, is the principle that "the Government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 2544.

The facts of these particular cases, however, threaten to obscure this principle. The defendants in these cases have by their means of protest chosen to challenge the government with extreme behavior. The government has accommodated their desire, and its own desire, for a constitutional test by prosecuting the defendants under the Flag Protection Act, rather than under other statutes whose application to defendants' actions might well be constitutional. Those statutes include, for instance, statutes that prohibit willful injury to federal property, and the *Haggerty* defendants have in fact been charged under such a statute (since they allegedly burned a flag belonging to the United States Postal Service). *See* 18 U.S.C. §§ 1361, 1362 (1982); *United States v. Haggerty*, 89-1434, J.S. App. 2a. Likewise, they include statutes that prohibit disorderly conduct or breaches of the peace, and the *Eichman* defendants were in fact arrested under such a statute. *See* 22 D.C. Code Ann. § 1121 (1981);

United States v. Eichman, 89-1433, J.S. App. 3a.[1] The First Amendment does not bar prosecution under these statutes because the interests underlying those statutes can be justified without reference to the content of the regulated speech.[2]

Thus, the question presented in these cases is not whether defendants are immune from prosecution, but whether the government may constitutionally prosecute defendants under the Flag Protection Act of 1989—a statute that singles out the American flag for protection against knowingly inflicted harm.[3] Contrary to the impression that both the government and the defendants appear to create, that Act has the greatest practical significance in a class of cases that is simply not before this Court—that class of cases in which an individual takes the simple step of engaging in orderly political protest

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[1] There are, of course, stringent limits on the government's ability to prosecute protestors for committing a breach of the peace. *See Texas v. Johnson*, 109 S. Ct. at 2542. But a prosecution for setting a fire on the steps of a government building so as to impede access to that building might well be constitutional. *Cf. Arshack v. United States*, 321 A.2d 845, 849 (D.C. 1974); 9 D.C. Code Ann. § 112 (1981); 40 U.S.C. § 193f (1982).

[2] Thus, through other penal statutes, the government may also, in appropriate cases, prosecute a flag-burner for theft, arson, or trespass. *See Texas v. Johnson*, 109 S. Ct. at 2544 n.8.

[3] The Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (amending Pub. L. No. 90-381, 82 Stat. 791, codified at 18 U.S.C. § 700 (1968)) provides in pertinent part:

> (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.
>
> (2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.
>
> (b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

by the mutilation of a flag which he owns. The critical question presented by these cases, therefore, is whether the government may constitutionally provide special punishment for persons who, through their expressive acts, knowingly damage an American flag—without regard, for example, to whether they owned the flag that they damaged, or whether they were on their own property (even in the privacy of their own homes) when they did so.

The sole governmental interest in these circumstances is the protection of the idea of the flag. In other words, in these circumstances, the government's purpose is simply to punish expression that damages the idea of the flag, and the ideas for which the flag stands. The First Amendment prohibits the government from seeking that result.

A. The Governmental Interest Underlying the Flag Protection Act Is Necessarily Related to the Suppression of Free Expression

There is no doubt that defendants' overtly political acts of burning flags were " 'sufficiently imbued with elements of communication' . . . to implicate the First Amendment." *Texas v. Johnson*, 109 S. Ct. at 2540 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). Under this Court's cases, therefore, the first pertinent issue for resolution concerns whether the Flag Protection Act is "related to the suppression of free expression." *See Texas v. Johnson*, 109 S. Ct. at 2538; *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Stated differently, the Court must determine whether or not the Flag Protection Act is "content-neutral." *See Texas v. Johnson*, 109 S. Ct. at 2543; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984). *Cf. Boos v. Barry*, 485 U.S. 312, 318-21 (1988); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-48 (1986). We think that the Flag Protection Act is plainly content-based.

1. *The Interest Underlying the Flag Protection Act Is the Protection of the Idea That the Flag Symbolizes*

This Court has consistently stated that "content-neutral" speech restrictions are those that "are *justified* without reference to the content of the regulated speech." *See Boos v. Barry*, 485 U.S. at 320 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (citations omitted)). The Flag Protection Act has not been, and cannot be, so justified.

Congress simply has no interest in protecting the flag's physical ingredients—the cloth and dye of which it is made—for their own sake. *Accord, Kime v. United States*, 459 U.S. 949, 953 (1982) (Brennan, J., dissenting from denial of certiorari) ("The Government has no esthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake"). This is most pointedly true of a privately owned flag, since the government can claim no ownership interest at all in such a flag. Nor does the Flag Protection Act seek to vindicate any other content-neutral government interest, such as avoiding bonfires in city streets. It cares not if a protestor publicly burns a bedsheet. Rather, the sole justification for this Act's protection of the flag is that the flag has substantive meaning as a symbol of the Nation. *Accord, id.*; *see also Texas v. Johnson*, 109 S. Ct. at 2542-2543. In other words, "[i]t is the character, not the cloth, of the flag which the . . . [Government] seeks to protect." *Spence v. Washington*, 418 U.S. 405, 421 (1974) (Rehnquist, J., dissenting).

As the Solicitor General concedes (Br. U.S. 28-29), the governmental interest in preserving the flag's symbolic integrity is directly related to the content of expression concerning the flag. This is because the government has "single[d] out one set of messages, namely the set of messages conveyed by the American flag, for protection." [4]

[4] Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1506 (1975).

Stated differently, even if the statute were not concerned with the reason—be it apathy, negligence, contempt, or disagreement with government policy—that animates a person to harm a flag, it nevertheless is singularly concerned with the impact that that expression has on the principles of unity and nationhood—i.e., the ideas for which the flag of the United States stands. Under the Court's cases, this governmental focus on the impact of the speaker's expression, and the desire to suppress that expression, makes the regulation "content-based" (even if not "viewpoint-based"). *See Texas v. Johnson*, 109 S. Ct. at 2543; *Boos v. Barry*, 485 U.S. at 319.

The nature of the conduct that the Flag Protection Act prohibits confirms this conclusion. The Flag Protection Act does not prohibit all conduct involving the flag; rather, it prohibits only conduct that the government believes will damage the flag as a symbol, that is, conduct by which someone "mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a flag. The Act is thus precisely analogous to a statute that does not prohibit all verbal speech about the flag, but rather prohibits only verbal speech that damages the flag. Such a statute is clearly directed at suppressing expression, whether or not it specifically requires that the defendant speak with contempt, *cf. Street v. New York*, 394 U.S. 576, 593 (1969), and is distinguishable from the Flag Protection Act only in that it proscribes verbal as opposed to nonverbal expression. That distinction is "of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here." *Texas v. Johnson*, 109 S. Ct. at 2545. In short, the Flag Protection Act has as its purpose the suppression of expression that attacks the flag as an idea, and is thus content-based.[5]

[5] One amicus brief suggests that the interest underlying the Flag Protection Act is preservation of the flag as an incident of sovereignty. (Brief of the Speaker and Leadership Group of the House

While the Solicitor General concedes (Br. U.S. 28-29) that the statute is content-based, Senator Biden, as *amicus curiae* (the "Amicus"), suggests that the Flag Protection Act is content-neutral because it regulates evenhandedly, without regard to the actor's motive (Br. 9, 13). This suggestion is incorrect.

The Flag Protection Act's prohibition is very much concerned with the speaker's viewpoint. The language of the Act indicates that Congress intended by that Act only to prohibit uses of a flag that are inconsistent with the flag's representation of unity and nationhood. The Act's prohibition broadly bars any knowingly inflicted harm to a "flag of the United States." The Act defines the term "flag of the United States" to include only flags that are "in a form that is commonly displayed," and the legislative history indicates that Congress shaped this definition to exclude from the Act's strictures certain commonly-accepted uses of the flag—such as cakes decorated as the flag, pictures of the flag, and products with flags printed on them; thus, whereas a political protestor may not cut a flag into pieces at a rally, a patriotic family may cut into a flag-shaped cake at an Independence Day party. *See* 18 U.S.C. § 700(2)(b); H.R. Rep. No. 231, 101st Cong., 1st Sess. at 2 (1989). Moreover, the Act expressly exempts from its prohibition the disposal of a soiled or

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of Representatives 19-28.) As both courts below recognized, however, the use of the flag to indicate sovereignty is itself a symbolic use. Except where the government is using its own flag to designate property as belonging to the United States, Congress' only possible interest in protecting the flag as an incident of sovereignty is to prevent or punish expressive acts amounting to rejection of that sovereignty. In other words, except in the limited instances in which the government is using government flags to designate its sovereign interest (and we do not doubt that the government could constitutionally enact a statute to protect the flag in those instances, *see infra* at n.12), preservation of the flag as an incident of sovereignty, like preservation of the flag as an emblem of nationhood, is related to the suppression of free expression.

worn flag; thus, whereas a political protestor may not burn a flag to make a point, members of the armed forces may ceremoniously burn a worn flag. *See* 18 U.S.C. § 700(2)(a)(2); H.R. Rep. No. 231, *supra*, at 9-10. These statutory hypocrisies makes apparent that Congress has forbidden flag burning only where "it is likely to endanger the flag's symbolic role, but [has] allow[ed] it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag . . . ." *Texas v. Johnson*, 109 S. Ct. at 2546. Such "viewpoint" regulation is anathema to the notion of free expression. *See Schacht v. United States*, 398 U.S. 58, 63 (1970).

In any event, as the Court made clear in *Boos v. Barry*, 485 U.S. at 319, "viewpoint" regulation and "content" regulation are separate and distinct concepts, and content regulation, like viewpoint regulation, is related to the suppression of free expression. In *Boos*, the government contended that a statute that prohibited displaying signs that would bring a foreign government into public disrepute was not content-based. *Id.* Since the statute did not express a preference for a particular idea, the Court agreed that it was not "viewpoint-based". *Id.* The Court concluded, however, that, since the government's justification—"the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments"—focused on the emotive impact of the speech, the statute was nevertheless content-based. *Id.* at 321. The Court stated that "a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.'" *Id.* at 319 (quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980)). *See also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 48.

The purported justification for the Flag Protection Act is no less content-based than was the government's justification in *Boos*. Here, Congress' interest is in protecting the flag's symbolic integrity; indeed, according to the Amicus (Br. 21), "*any* flag protection statute will necessarily be designed to protect the flag's symbolic value[.]" To protect the flag's symbolic integrity, however, is to protect the flag's dignity by shielding it from expressive conduct that is damaging to it. As in *Boos*, this justification focuses "*only* on the content of the speech and the direct impact that speech has on its listeners." *Boos*, 485 U.S. at 321. *See Texas v. Johnson*, 109 S. Ct. at 2543. It is therefore content-based.

This conclusion follows directly from the Court's holding in *Spence v. Washington*. In *Spence*, the defendant affixed a peace symbol to a flag that he owned and displayed the flag out of his apartment window. The state prosecuted him under a statute that provided that "*nothing* . . . [could] be affixed to or superimposed on a United States flag or a representation thereof." 418 U.S. at 414 n.9 (emphasis in original).[6] In other words, the operation of the statute did not depend on whether the viewpoint expressed was favorable or unfavorable to the flag. Indeed, in dissent, then-Justice Rehnquist emphasized that the statute in issue did "not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed

[6] As quoted in *Spence*, 418 U.S. at 407 (omissions in original quote), the statute provided, in pertinent part:

> No person shall, in any manner, for exhibition or display:
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> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or
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> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . . .

commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message." *Id.* at 422-423. The Court nevertheless overturned the conviction, finding the statute unconstitutional as applied to the defendant's activity. *Id.* at 414. In doing so, the Court expressly held that the state's "interest in preserving the national flag as an unalloyed symbol of our country" was "directly related to expression in the context of activity like that undertaken by appellant." 418 U.S. at 412, 415 & n.8. This is because, as Justice (then-Judge) Scalia has explained in describing *Spence*, the only reason to prevent misue of a flag is "related to the communicative content of the flag." *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 624-625 (D.C. Cir. 1983) (Scalia, J., dissenting), *reversed sub nom., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

The Amicus also errs in suggesting (Br. 11-13) that the Act is content-neutral merely because some non-expressive conduct could come within its prohibition. It cannot seriously be argued that this statute was designed to reach non-expressive conduct. The principle is well-established that the reasonably foreseeable effect of a legislative act gives rise to a "strong inference" that Congress intended the statute's predominant effect. *See Personnel Adm'r v. Feeney*, 422 U.S. 256, 279 n.25 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979). Here, the Flag Protection Act's impact will almost invariably fall on conduct expressive in nature; it is virtually inconceivable that someone would knowingly burn an unsoiled flag for any other reason.

While evidence of another purpose may defeat that inference, no one has provided an explanation for this statute other than a desire to suppress speech. Thus, the statute must be held to have speech-suppression as its purpose. To conclude otherwise would, in effect,

permit Congress to insulate its legislation from the First Amendment by simply extending a statute's prohibition to cover some potential, though in practice unlikely and trivial, non-expressive conduct. This Court should not allow Congress to so immunize its speech-suppressing actions.[7]

2. *The Legislative History Confirms Congress' Purpose to Suppress Expression and Provides an Independent Reason to Invalidate the Act*

Any possible doubt about Congress' purpose in enacting the Flag Protection Act is resolved by the legislative history of the statute. That history confirms that, in enacting the Flag Protection Act, Congress sought to preserve the flag's symbolic value, and that it sought to do so through the suppression of expression that would adversely affect this symbol.

Both the Senate bill and the House bill, in seeking to protect the flag's physical integrity, were clearly concerned with protecting the flag's symbolic value. *See* S. 1338, 101st Cong., 1st Sess. (1989); H.R. 2978, 101st Cong., 1st Sess. (1989); S. Rep. No. 152, 101st Cong., 1st Sess. 2 (1989); H.R. Rep. No. 231 at 2. Indeed, the Senate Committee Report candidly acknowledged:

> In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 3; *see also id.* at 5 (reiterating that "S. 1338 is intended to protect the flag because

[7] Because the Flag Protection Act is content-based, it does not qualify for the more lenient treatment that content-neutral time, place, or manner restrictions receive. *Accord, Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972); *Boos*, 485 U.S. at 321. The fact that alternative channels of communication supposedly exist is thus irrelevant. *Accord, Texas v. Johnson*, 109 S. Ct. at 2546 n.11; *Spence*, 418 U.S. at 411 n.4.

of what it expresses and represents"). On the House and Senate floors, the statute's purpose was made equally clear:

> No one claims that we are interested in protecting the material, the thread, and the dye in the flag. We protect the flag as a symbol, including against those who would desecrate the flag as part of a political expression.

135 Cong. Rec. S12,579 (daily ed. Oct. 4, 1989) (statement of Sen. Hatch). *See also* 135 Cong. Rec. S12,621 (daily ed. Oct. 4, 1989) (statement of Sen. Dole) ("Americans want to protect the flag because they want to protect it as the symbol of our Nation. Americans . . . are not concerned about the cloth, the fabric, the red, white, and blue dye, the physical components of the flag."); 135 Cong. Rec. H5509 (daily ed. Sept. 12, 1989) (statement of Rep. Alexander) ("the flag is more than cloth and color").

The legislative history similarly confirms that, in seeking to protect the flag's symbolic value, Congress intended to do so through the suppression of expression. As Senator Roth, a principal sponsor of the bill, explained:

> [W]hen America's detractors violate our flag—whether in the alleys of Iran or on the streets of Dallas—they are insulting all who have given so much—they are insulting all who believe so strongly in the values symbolized by the flag. And they are assaulting those very values. And that is why this bill is so important.

135 Cong. Rec. S12,584 (daily ed. Oct. 4, 1989). Senator Gramm likewise stated:

> I cannot imagine a situtation [sic] in which someone would desecrate the American flag other than to make a political statement about hating America

> and its great institutions. So I intend to vote for this bill.

135 Cong. Rec. S12,600 (daily ed. Oct. 4, 1989). Senator Heflin thus added:

> Although it is not often that someone destroys an American flag, the power of this image and the symbol dictate that we must protect its integrity. Allowing the legal burning of the flag would create a mockery of the great respect so many patriotic Americans have for the flag.

135 Cong. Rec. S12,577 (daily ed. Oct. 4, 1989). In short, members of Congress repeatedly and forthrightly declared that, in protecting the flag's symbolic value, they sought to enact a statute that would suppress those who would express themselves by damaging the flag.[8]

The Amicus responds (Br. 16-19) that the Court may not properly resort to the legislative history of the Flag Protection Act to confirm that its purpose is speech-suppression. This claim is contradicted by the Amicus' own repeated resorts (Br. 27-30) to this history to demonstrate that Congress was attempting to enact a constitutional statute—or at least to insulate its actions from constitutional challenge. It is, of course, unnecessary to resolve the Amicus' claim, since the statute in fact has no conceivable purpose other than the suppres-

[8] Although he acknowledges (Br. 16) that "some legislators were motivated more by a desire to reach conduct conveying one particular message," the Amicus incorrectly asserts (Br. 16 n.6) that it was only the proponents of a constitutional amendment who were improperly motivated. The legislative history quoted above demonstrates that members of Congress who spoke in favor of the statute desired to suppress expression. *See also* 135 Cong. Rec. H5501 (daily ed. Sept. 12, 1989) (remarks of Rep. Brooks); 135 Cong. Rec. S12,611 (daily ed. Oct. 4, 1989) (remarks of Sen. Kohl); 135 Cong. Rec. H6996 (daily ed. Oct. 12, 1989) (statement of Rep. Smith); 135 Cong. Rec. H5512 (daily ed. Sept. 12, 1989) (statement of Rep. Lowey); 135 Cong. Rec. S12,616 (daily ed. Oct. 4, 1989) (remarks of Sen. Wilson).

sion of expression. But, in any event, it is clear that the Court may properly look to the legislative history in determining whether the Flag Protection Act has a speech-suppressing purpose.

Inquiry into whether a legislature has acted with an improper motive is an appropriate tool of constitutional review, and discovery of an improper motive provides an independent reason to subject a legislative decision to exacting scruntiny. If the legislative history discloses an improper purpose, the Court should subject the legislative decision to the same scrutiny that it would receive if the illicit objective were reflected on the statute's face. While the Court must be cautious in drawing conclusions based on inquiries of this type, its duty to enforce the Constitution requires that it consider all evidence of unconstitutional motive and invalidate any legislative acts—even acts otherwise within the power of the legislature to enact—that are infected by such motive. *Cf. City of Richmond v. United States*, 422 U.S. 358, 378-379 (1975) (holding that, under the Voting Rights Act, even if an annexation would otherwise be valid, it is unconstitutional if motivated by discriminatory intent). *See also*, Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 116-130.[9]

For this reason, the Court has regularly inquired into unconstitutional motives, and invalidated legislation solely on that basis. For instance, in the context of equal protection challenges under the Fourteenth Amendment, the Court has reviewed for, and indeed required, intent to discriminate. *See, e.g., Washington v. Davis*, 426 U.S. 229, 239-245 (1976); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-268

[9] This, of course, is a far different question than the relevance of legislative history to an issue of statutory construction. One need not agree with the utility of legislative history for that purpose in order to recognize its relevance to a constitutional inquiry that turns upon improper motive.

(1977). Similarly, in the context of establishment clause challenges under the First Amendment, the Court has reviewed for, and invalidated where it found, an intent to advance religion. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 585-594 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985); *Stone v. Graham*, 449 U.S. 39, 40-41 (1980). There is no reason for treating free expression challenges under the First Amendment differently, and the Court has not done so. *See, e.g., Boos v. Barry*, 485 U.S. at 319-321 (suggesting that the legislature's "desire" is relevant); *Board of Educ. Dist. No. 26 v. Pico* 457 U.S. 853 (1982) (remanding a free expression challenge under the First Amendment to the district court to determine whether the government officials had acted with improper motive).[10]

To be sure, the Court in *O'Brien*, 391 U.S. at 384-385, eschewed such an inquiry into legislative motive, and, later, in *Palmer v. Thompson*, 403 U.S. 217, 224-226 (1971), the Court heavily relied on *O'Brien*'s reasoning in expressing an unwillingness to inquire into illicit motivation. However, in *Washington v. Davis*, the Court expressly repudiated that reasoning, stating that, "[t]o the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary . . . ." 426 U.S. at 244 n.11. *See also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev-*

[10] *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811-813 (1985) (remanding the case for determination of whether the executive order at issue was motivated by a desire to suppress a particular point of view, because the "existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination."); *id.* at 833 (Stevens, J., dissenting) ("Everyone on the Court agrees that the exclusion of 'advocacy' groups from the Combined Federal Campaign (CFC) is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups.").

enue, 460 U.S. 575, 580, 592 (1983) (expressing doubt about *O'Brien*'s statement concerning legislative purpose and implying that illicit legislative motive is a sufficient, although not a necessary, reason to find a violation of the First Amendment).

Were the conclusion otherwise, improperly motivated legislative actions would often be immune from judicial review. The restraints of the First Amendment, or indeed any constitutional provision in which motive is a relevant consideration, would not apply as long as the government was careful not to declare its unconstitutional purpose on the statute's face. The Constitution's prohibition on improperly motivated government action cannot be so easily avoided.

B. Contrary to the Solicitor General's Argument, This Court Should Not Defer to Congress

The Solicitor General candidly recognizes that the statute is designed to suppress expression and that it runs afoul of the Court's decision in *Texas v. Johnson*. Indeed, the Court has repeatedly held that the government's interest in protecting the flag as a symbol is not sufficiently compelling to suppress political protest involving the flag. *See Texas v. Johnson*, 109 S. Ct. at 2545; *Spence*, 418 U.S. at 415; *Street*, 394 U.S. at 593; *Barnette*, 319 U.S. at 642. The Solicitor General thus urges that this Court overrule *Johnson* and, presumably, its decision in *Spence* as well. The Solicitor General has not, however, even remotely offered the "special justification" demanded for departure from the doctrine of *stare decisis*. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

The only justification that he suggests is that Congress, in its considered judgment, has determined that the statute ought to be held constitutional. This suggestion is untenable. Indeed, the Court squarely rejected such a suggestion just last Term (in a case that the gov-

ernment does not cite). *See Sable Communications of California, Inc. v. F.C.C.*, 109 S. Ct. 2829 (1989).

In *Sable*, in response to the government's suggestion that the Court should defer to Congress' judgment (including its legislative findings), the Court emphatically reaffirmed that it is for the Court, exercising its own independent judgment, to decide whether Congress has violated the Constitution. *Id.* at 2838. That proposition has been accepted since *Marbury v. Madison*, and it has special force when a statute implicates the First Amendment. *Id.* "Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978). *See also id.* at 843; *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 388 n.18 (1984); *Sable*, 109 S. Ct. at 2838. No different conclusion is permissible in the context of this Act.[11]

C. Sustaining This Statute Would Threaten First Amendment Protection for All Speech Critical of the Government

In arguing that the Flag Protection Act is unconstitutional, we do not mean to suggest that the government cannot promote the American flag as a symbol. *Accord, Texas v. Johnson*, 109 S. Ct. at 2547. The government through its own speech may encourage respect for that

[11] The United States' and the Amicus' reliance on *Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), is misplaced. In *Columbia Broadcasting*, the Court took pains to reiterate that it will not defer to Congress on a constitutional question. *Id.* at 103. Indeed, any weight that the Court did give to Congress' judgment in that case was because "the broadcast media pose unique and special problems not present in the traditional free speech case." *Id.* at 101.

symbol, and it may even prevent others from physically interfering with the government's own speech. By flying the flag from a post office building, for instance, the government is engaging in such encouragement, and it has an interest in preventing a protestor from mutilating a flag—i.e., a symbol—that the government has displayed.[12] The First Amendment, however, does not allow the government to regulate simply to suppress the speech of others, as it has so manifestly sought to do through the Flag Protection Act.

Upholding the Flag Protection Act would thus have deep and lasting effects on the First Amendment. Validating Congress' effort to ban expression that might damage the flag's symbolic integrity would threaten far more than the right of protestors to burn the American flag. If Congress may enact a statute that protects the integrity of one symbol—the flag—there is no defensible principle on which Congress can be stopped from protecting the integrity of any other symbol. Congress could thus pass laws protecting copies of the Declaration of Independence, copies of the Constitution, pictures of the President, or replicas of important memorials.

[12] Congress could thus craft a statute to prohibit mutilation of a flag that the government owned, and could prosecute defendants, such as the *Haggerty* defendants, who burn flags belonging to a United States Post Office. Such a statute would be similar to a statute that prohibited spray painting the Washington Monument, where the government clearly has an interest in maintaining the aesthetic integrity of its own property. The Flag Protection Act, however, is not limited to protection of the government's own speech, or the preservation of the government's own property, nor can it be. Because "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits[,]" it is plainly overbroad. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 965-966 (1984). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *City of Houston v. Hill*, 482 U.S. 451, 458-467 (1987).

More troubling still, if the Flag Protection Act were upheld, there would be no defensible principle on which to stop Congress from banning verbal, as well as nonverbal, expression. As noted in *Texas v. Johnson*, the line between speech and expressive action in this context is nonexistent. *See* 109 S. Ct. at 2545. Expression and conduct are intertwined in virtually all communicative behavior, and defiant or contemptuous words can strike as deeply as nonverbal expression. Thus, if the government may prohibit nonverbal attacks on the symbolic value of the flag, it can prohibit verbal attacks on that symbol. If it can prohibit verbal attacks on the symbol of the flag, it can prohibit verbal attacks on other, indeed all, symbols of our national unity. It could also prohibit criticism of the nation, and the government, for which those symbols stand. Sustaining such legislation would erase a shared view of the First Amendment going back to the very foundation of our Nation.[13] Preserving the right of our citizens to criticize the government and its symbols is vital to the cherished function of this nation's press, its public libraries, its artists, and those who dissent from our government's policies. It is indispensible to the Nation itself.

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[13] It is now generally accepted that the Alien and Sedition laws, which barred criticism of the government, are the quintessential example of the type of regulation that the First Amendment is designed to forbid. *See New York Times v. Sullivan*, 376 U.S. 254, 273-275 (1964). Sustaining this statute threatens to validate a modern version of those discredited laws.

CONCLUSION

The judgments of the district courts should be affirmed.

Respectfully submitted,

TIMOTHY B. DYK
(Counsel of Record)
GLEN D. NAGER
MARGARET H. MERIWETHER
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 879-3939

Of Counsel:

ELLIOT M. MINCBERG
JOHN S. GOMPERTS
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

RICHARD SCHMIDT
COHN & MARKS
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036
(202) 293-3860

BRUCE SANFORD
DOUGLAS LEE
BAKER & HOSTETLER
1050 Connecticut Ave., N.W.
11th Floor
Washington, D.C. 20036
(202) 861-1500

J. LAURENT SCHARFF
REED SMITH SHAW & MCCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8660

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